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In The

Supreme Court of the United States

October Term, 1984

JAMES DAVID OSTICCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Where the Government seeks to admit out-of-court co-conspirator declarations under Federal Rule of Evidence 801(d)(2)(E) does the assertion by the out-of-court declarant of Fifth Amendment privilege make him "unavailable" in the confrontation sense of *Ohio v. Roberts*, 448 U.S. 56 (1980) and, if not, does not a criminal defendant's right of confrontation require the district court to balance such right of confrontation against the Government's interest in withholding statutory immunity and, in such circumstances, should not the district court require the Government to make an appropriate showing that it has some significant interest in withholding statutory immunity before deeming the declarant "unavailable"?

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No.

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JAMES DAVID OSTICCO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner James David Osticco prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed the judgment of conviction entered against him following a jury verdict of guilty.*

* Petitioner notes that a petition for writ of certiorari will be filed September 7, 1984, in the case of *Gibbs v. United States*, ____ F.2d ____, No. 82-1096 (3d Cir. 1984) (En Banc), raising cognate issues concerning the relationship between the Confrontation Clause and Federal Rule of Evidence 801(d)(2)(E). The cases present related issues but are otherwise unrelated.

STATEMENT OF JURISDICTION

Petitioner James David Osticco seeks a writ of certiorari to review the judgment (Appendix B) rendered by the United States Court of Appeals for the Third Circuit on June 12, 1984. On July 9, 1984, the Court of Appeals for the Third Circuit denied petitioner's petition for rehearing (Appendix C). The judgment affirmed petitioner's criminal conviction in the United States District Court for the Middle District of Pennsylvania following a jury trial and denial of post-trial motions (Appendix A).

The United States Supreme Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. §1254(1). Rehearing having been denied on July 9, 1984, this petition is timely filed on September 7, 1984. Supreme Court Rule 20.1.

RELEVANT CONSTITUTIONAL PROVISIONS AND RULES

United States Constitution, Amendment VI—Jury Trial for Crimes and Procedural Rights:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rule of Evidence 801:

Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

* * *

(2) Admission by party opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

A. Procedural History

Petitioner was indicted by a federal grand jury in the Middle District of Pennsylvania and charged with violations of 18 U.S.C. §371 (conspiracy) and 18 U.S.C. §1503 (obstruction of justice).

Petitioner was tried before the Honorable William W. Caldwell and a jury and was convicted on both counts. He was sentenced to a term of imprisonment of eight years and a $10,000 fine.

On direct appeal to the United States Court of Appeals for the Third Circuit, petitioner's conviction was affirmed and rehearing denied. A stay of mandate has been issued to and including September 7, 1984, pending application for certiorari (Appendix D).

B. Concise Statement of Facts

Petitioner was alleged to have conspired to obstruct the administration of justice by preventing and to have actually prevented Charles Cortese from giving truthful testimony in a 1979-1982 grand jury investigation of an alleged jury tampering incident occurring in 1977. In essence, the Government contended that petitioner had been criminally involved in the earlier jury tampering incident (although he was never charged in connection with this incident) and to cover up his involvement he obstructed the ensuing grand jury investigation by encouraging Cortese, who was alleged to also have been criminally involved in the jury tampering incident, to refuse to testify before the investigating grand jury and, upon being granted immunity, to perjure himself before the investigating grand jury.

Before trial, Cortese entered a plea of guilty to related charges and was awaiting sentencing. The Government's trial evidence against petitioner consisted, in the main, of the testimony of an informer, Frank Parlopiano ("Parr"), whose testimony was partially corroborated by Title III and consensual tape recordings. The tapes in question contained conversations between petitioner and Parr and, additionally, conversations between Parr and Cortese. There were no tapes of conversations between petitioner and Cortese, nor did the Government have any evidence that Cortese and petitioner had spoken together, other than statements which Cortese had made to Parr in which he stated that he had discussed matters of relevance with petitioner.

As an informer, Parr played the role of an intermediary between petitioner and Cortese. In the course of his role as intermediary (in which he was taping both of the principals), he extracted from Cortese tape-recorded narratives of past dealings between Cortese and petitioner. This key evidence consisted of several tapes in which Cortese suggested that both he and petitioner had participated in the earlier jury tampering incident and was directly incriminating of petitioner in that Cortese stated that petitioner had put him up to the jury tampering (a proposition on which there was no other evidence). This evidence was critical to the Government's case because it substantiated the Government's theory of the case that petitioner had a motive to obstruct the ensuing grand jury investigation (which colored his otherwise ambiguous statements to Parr) because petitioner himself was at risk if the truth were uncovered by the investigating grand jury.

At trial, petitioner made timely objection to the admission of the out-of-court declarations by Cortese to Parr, *i.e.*, both the declarations contained on the tapes, as well as Parr's recollection of conversations not on tape. The Government contended that Cortese's declarations were admissible under

Federal Rule of Evidence 801(d)(2)(E) in that they were declarations made by a co-conspirator during the course of the conspiracy and in furtherance of the conspiracy. Citing this Court's opinion in *Ohio v. Roberts,* 448 U.S. 56 (1980), petitioner persisted in his objection, taking the position that such declarations could not be admitted into evidence absent a showing by the Government of unavailability of Cortese. In response to this position, the Government subpoenaed Cortese and, in a hearing outside the presence of the jury, Cortese asserted Fifth Amendment privilege and refused to testify. Petitioner continued to press his position, arguing that the mere assertion of Fifth Amendment privilege, even if well-founded, did not make the witness "unavailable" in the *Roberts* confrontation sense, absent a showing by the Government that it had a significant interest in withholding statutory immunity from Cortese. The trial court rejected petitioner's position in this regard and did not require the Government to make any showing that it had any interest in withholding such immunity, despite the fact that Cortese had already entered a plea of guilty and was awaiting sentencing.

REASON FOR GRANTING THE WRIT

Supreme Court Rule 17.1 states that one of the reasons that will be considered in determining whether there are present the special and important circumstances warranting review on certiorari is whether a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The issue presented here is unsettled, but presents an important question of federal law and recurring issue with respect to the interplay between the Confrontation Clause and Federal Rule of Evidence 801 dealing with the admissibility of co-conspirator declarations.

Where the Government seeks to admit out-of-court co-conspirator declarations under Federal Rule of Evidence 801(d)(2)(E), the assertion of the out-of-court declarant of Fifth Amendment privilege does not make him "unavailable" in the confrontation sense of *Ohio v. Roberts* absent an appropriate showing by the Government that it has some significant interest in withholding statutory immunity.

This Court in *Ohio v. Roberts*, 448 U.S. 56 (1980), discussing the Confrontation Clause of the Sixth Amendment to the United States Constitution, explained that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." *Id.* at 66. In order to prove unavailability, the prosecutor must make a good faith effort to find or make the witness available:

> The basic litmus of Sixth Amendment unavailability is established: [A] witness is not unavailable for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial. *Id.* at 74.

Mr. Justice Blackman explained just what this good faith standard required:

> [I]f no possibility of procuring the witness exists . . . "good faith demands nothing of the prosecutor." ***But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation*** . . . the ultimate question is whether the witness is unavailable

> despite good faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate. *Id.* at 74-75. (emphasis added).

Cortese's assertion of Fifth Amendment privilege in the present case was found by the District Court to be determinative, relying on language in the panel decision in *United States v. Gibbs,* 703 F.2d 683 (3d Cir. 1983) (withdrawn) which explained that "when a witness invokes his Fifth Amendment privilege, this renders him legally unavailable." *Id.* at 691.

In the recently filed *en banc* opinion of the Court of Appeals for the Third Circuit in *United States v. Gibbs,* ____ F.2d ____ (No. 82-1096) (3d Cir., June 15, 1984), Judge Garth, writing for the majority, noted:

> Had anyone mentioned the word "availability", of course, it would have been a relatively simple matter for the Government to address that question and produce proofs as to Quintiliano's availability or unavailability. Presumably the Government could have called Quintiliano, and if Quintiliano had asserted the Fifth Amendment privilege against self-incrimination, he then would have been deemed unavailable. *See United States v. Pelton,* 578 F.2d 701, 709-710 (8th Cir. 1978). Hence, it is solely by reason of Gibbs' failure to raise the issue of Quintiliano's availability before the District Court, the record is barren of any evidence of Quintiliano's unavailability. (Slip. op. at p. 22).

United States v. Pelton, 578 F.2d 701 (8th Cir. 1978) dealt with criminal defendant's attempt to admit the grand jury testimony

of a witness on the theory that the witness was unavailable. Emphasizing that the proponent of the testimony bears the burden of proving unavailability, the court found that the criminal defendant had not carried his burden. The opinion does not discuss the question of the Government's unique power to confer testimonial immunity.

It is true that Federal Rule of Evidence 804(a)(1) provides that a declarant is "unavailable" if he or she "is exempted by ruling of the Court on the ground of privilege from testifying concerning the subject matter of his statement." Judge Weinstein in his treatise, Weinstein's Evidence, ¶ 804(a)(01), at 804-34, observes:

> In a number of cases, defendants have argued that when the Government fails to grant immunity to a witness who invokes the Fifth Amendment, the resulting unavailability was caused by the Government which should not therefore be able to introduce the unavailable witness' hearsay declaration pursuant to Rule 804. In the decisions to date, the Courts have rejected this argument. They have found that the power of the Executive Branch to grant immunity to a witness is discretionary so that no obligation exists on the part of the U.S. Attorney to seek immunity. *Even if there is no constitutional right to insist on a grant of immunity, fairness in most instances should preclude use of such hearsay unless the Government can show a strong reason for refusing the grant.* (Emphasis added.)

The present case involves the unusual circumstance that the declarant, Cortese, had been granted immunity during the investigative stage where it suited the Government's tactical goals

to remove his Fifth Amendment privilege. Immunity was withheld, however, where it served the Government's tactical interests to use the out-of-court declarations. The Court of Appeals for the Third Circuit has frowned upon the withholding of immunity by the Government to gain tactical advantage. *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978).

"Unavailability" in a Confrontation Clause context must be considered in light of the Government's far-reaching testimonial immunity power which the Government may dispense when it serves its prosecutive needs. This Court recently observed in *United States v. Doe*, ____ U.S. ___, 34 Crim. L.R. 3083, 3086 (1984):

> As we stated in *Pillsbury Co. v. Convoy*, ____ U.S. ____ (1983), in passing the use immunity statute, "Congress gave certain officials in the Department of Justice exclusive authority to grant immunities." *Id.* at ____. "Congress foresaw the Courts as playing only a minor role in the immunizing process. . . ." *Id.* at ____, n. 11. The decision to seek use immunity necessarily involves a balancing of the Government's interests in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation . . . Congress left this decision exclusively to the Justice Department. If on remand the appropriate official concludes that it is desirable to compel respondent to produce his business records, the statutory procedure for requesting use immunity will be available.

In the present case, the appropriate officials concluded that it was desirable to compel Cortese to testify before the grand jury but not desirable to compel him to testify at trial. The record of this case shows no governmental interest in declining immunity

for trial testimony; Cortese had already entered a plea of guilty to perjury and was awaiting sentencing. No circumstances suggesting an "immunity bath" was presented.

Unlike the situation presented in *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980) where the defense was the proponent of the in-court testimony of a privileged witness, the circumstances here presented involve the Government itself as the proponent of the testimony of the witness, albeit, through out-of-court declarations, wherein a clash between the evidence proposed and petitioner's confrontation rights is presented. Under the circumstances where the Government is both the proponent of the evidence and has the exclusive power to make the witness "available", it is reasonable to suggest that the Government may not discharge its obligation of showing unavailability by merely demonstrating that the witness has a privilege where the Government possesses the power to remove that privilege.

We urge the Court to grant certiorari to consider whether the Government's modern practice of freely granting testimonial immunity where it serves the Government's interests should be taken into account in the "unavailability" setting here presented. Limiting the teaching of *Ohio v. Roberts, supra*, to the Government's obligation to use good faith efforts to secure the physical presence of a witness, and not necessarily his testimonial presence, is to ignore the modern reality of the way in which use immunity is employed by the Government. An analogy exists between the correct view of the modern notion of "unavailability", given current practices respecting testimonial immunity, and the "standards of modern air travel and not of the sailing ship" which the Court of Appeals for the Third Circuit referred to almost twenty years ago in passing upon the Government's efforts to secure the physical presence of a witness:

> The reasonableness of efforts to secure attendance in the Virgin Islands of a witness, whether he is in another state of the Union or in a foreign county, must be judged by the standards of modern air travel and not of the sailing ship or even the steamship. Where the liberty of a defendant is at stake, the Government which prosecutes him may not secure the benefit of incriminating testimony against him unless it shows its genuine and bonafide effort to secure the attendance of a witness. An effort which expires at the shore line of the Virgin Islands cannot be said to have inherently in it the proof of its genuineness and its bonafide character. *Government of Virgin Islands v. Aquino,* 378 F.2d 540, 552 (3d Cir. 1967).

Notwithstanding Judge Weinstein's observation that "fairness in most instances should preclude use of such hearsay unless the Government can show a good reason for refusing the grant of immunity," 4 Weinstein's Evidence ¶ 804(a)(1) at 804-34, the United States Court of Appeals for the Second Circuit has expressly rejected the notion that the Government is obligated to grant immunity to an unavailable witness before offering the witness' out-of-court statement against the defendant. *United States v. Lang,* 589 F.2d 92, 95-96 (2d Cir. 1978).

Petitioner, however, urges that the approach to the question should be one of balancing interests, rather than a categorical rejection of the concept that if the Government wishes to make affirmative use of out-of-court declarations, it should have to make some showing that it has a significant interest in foregoing use of statutory immunity to make the witness available. In the present case, the cost to the Government in granting testimoninal

immunity was nothing because Cortese had already been convicted on his plea of guilty.

As noted *supra*, a petition for writ of certiorari will be filed with this Court on September 7, 1984 in the case of *Gibbs v. United States*, ____ F.2d ____ (No. 82-1096) (3d Cir. 1984) in which the United States Court of Appeals for the Third Circuit, sitting *en banc* considered at length the Confrontation Clause component of Federal Rule of Evidence 801, specifically directed to the question of whether the "unavailability" standard of *Ohio v. Roberts*, 448 U.S. 56 (1980) applies with respect to co-conspirator declarations which, as treated in the Federal Rules of Evidence, are not "hearsay". The Court in *Gibbs* found that the Confrontation Clause question had not been properly preserved by failure to make a contemporaneous objection based on that constitutional ground. In the present case, the issue was properly raised and preserved. The issue in the present case goes a step beyond the basic Confrontation Clause issue and addresses the question of what constitutes "unavailability" where the Government possesses the power to confer statutory immunity.

Petitioner urges this Court to grant certiorari to consider the important question under federal law of the relationship of the Confrontation Clause with the Federal Rule of Evidence 801 and the issue specifically raised in this petition of whether an out-of-court declarant may be deemed "unavailable" where the Government may remove such unavailability by grant of statutory immunity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

JOHN ROGERS CARROLL
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Attorneys for Petitioner

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED FEBRUARY 7, 1984 DENYING POST-TRIAL MOTIONS, *UNITED STATES VS. OSTICCO*, 580 F. SUPP. 484 (M.D. PA. 1984)

UNITED STATES of America, Plaintiff,

v.

James David "Dave" OSTICCO, Defendant.

Crim. No. 82-00149-01.

United States District Court, M.D. Pennsylvania.

Feb. 7, 1984.

Eric Holder, Jr., U.S. Dept. of Justice, Washington, D.C., for plaintiff.

Charles Gelso, Wilkes Barre, Pa., John Rogers Carroll, Carroll & Carroll, Philadelphia, Pa., for defendant.

MEMORANDUM

CALDWELL, District Judge.

I. Introduction

Before the court for disposition are the post-trial motions filed by defendant Osticco following his conviction by a jury in a trial held on August 17-24, 1983. The issues raised are sufficiency of the evidence, the propriety of the jury charge with regard to acts occurring after March 7, 1980, the unavailability of Charles

Appendix A

Cortese as a witness for purposes of trial, the admissibility of certain tapes of Cortese-Parlopiano conversations, and suppression of electronic surveillance. At sentencing on December 16, 1983, defendant's counsel also presented argument on the propriety of the consecutive sentences imposed.

II. Sufficiency of the Evidence

With regard to the sufficiency of the evidence contentions raised by defendant, we note initially that the applicable test is whether "viewing the evidence in the light most favorable to the Government, together with all reasonable inferences to be drawn therefrom, substantial evidence supports the jury's verdict." *United States v. Sturm*, 671 F.2d 749 (3d Cir. 1982), *cert. denied*, 459 U.S. 842, 103 S.Ct. 95, 74 L.Ed.2d 86. The case against the defendant was based largely upon the testimony and credibility of Frank Parlopiano, also known as Frank Parr. Parr, who was serving for the government, had frequent contact with Osticco and more or less became his confidant concerning the subject matter of this proceeding. Parr also became Osticco's contact with Cortese concerning their mutual concern over a grand jury investigation. Certain conversations between Parr and the defendant and between Parr and Cortese were recorded, and others were recounted by Parr in his testimony. Viewing the recordings and Parr's testimony in a light favorable to the prosecution the jury could have concluded the following scenario.

Frank Parlopiano met defendant Osticco in 1975 through a mutual acquaintance, Russell Bufalino. Parlopiano met Charles Cortese during the summer of 1979 when Cortese visited the newspaper where Parlopiano and Cortese's fiancee were employed. Cortese at that time told Parlopiano that he was the former husband of the holdout juror in the flood fraud trial. On the

same occasion, Cortese indicated that Parlopiano should "ask Dave [Osticco] about me." (N.T., vol. I, 19). Frank Parlopiano was subsequently contacted in August, 1979, by FBI special agent Francis Mulholland, at which time Parlopiano agreed to report back to the FBI on conversations he had with defendant Osticco and with Charles Cortese. Commencing in April of 1980, after he had been subjected to a body search by Osticco at Medico Industries, Parr agreed to help record these conversations and actually began to participate in such taping on May 13, 1980. During the course of his contacts, both recorded and unrecorded, Parlopiano was able to learn about jury tampering in a 1977 federal criminal trial in which Cortese's ex-wife was the lone holdout juror for acquittal, and for whose actions as a juror Cortese received both money and property.

In about December of 1979, Parlopiano learned that Cortese had been subpoenaed to testify before a federal grand jury that was investigating the jury tampering. Upon Parr's informing Osticco, Osticco said he would pay Cortese's legal expenses. Subsequently, Osticco told Parlopiano that Cortese must lie to keep himself and others out of trouble but later told Parlopiano to tell Cortese to take the fifth amendment and "keep his mouth shut." (N.T., vol. I, 26). According to Parlopiano, Cortese's invocation of the fifth amendment before the grand jury on January 3, 1980, came at Osticco's direction and Osticco reimbursed Parlopiano on each of the six or eight different times that Parlopiano gave money to Cortese.

Cortese was again subpoenaed to appear before a federal grand jury on March 7, 1980, and prior to that appearance Parlopiano and Osticco met. According to Parlopiano, he was told by Osticco that Cortese had to lie and watch what he said to avoid being prosecuted for perjury. Parlopiano relayed these admonitions to Cortese prior to his second appearance before the grand jury. Following his grand jury appearance Cortese met

with Parlopiano and stated he had lied even though he had been granted immunity. At the same meeting, Cortese provided Parlopiano with a list of the questions he was asked before the grand jury. These questions were subsequently passed to Osticco.

Evidence in support of every allegation in the indictment was presented to the jury and Parlopiano was fully cross-examined by defense counsel. The court is aware that inconsistencies at times existed in Parlopiano's testimony and these have been painstakingly pointed out in detail by defense counsel. However, the government's questions to Parlopiano, even on direct examination, were geared toward giving Parlopiano the opportunity to explain any contradictions and inconsistencies, particularly as adduced from the tapes he made. In essence, this case turned around the jury assessment of Parlopiano's credibility and it is hornbook law that determinations on credibility are within the province of the fact finder. Rather than attempting to isolate portions of the record we have reviewed the testimony and recordings as a whole. Having accomplished this, we believe that the jury could conclude beyond a reasonable doubt that a conspiracy existed and that defendant, by his influence over Cortese, obstructed the proceedings of the federal grand jury. Defendant's position regarding sufficiency of the evidence is therefore denied.

III. The Jury Charge

One of the issues raised by defendant arose in conjunction with the jury charge given with respect to 18 U.S.C. §1503, the obstruction of justice statute. Defendant has argued that the court's references to whether Cortese remained a "potential" grand jury witness were improper. What defendant has overlooked, however, as the government has pointed out, is that defendant was charged under the omnibus clause of the statute, which criminalizes the

activity of one who "corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice." Therefore, any reference by the court to Cortese's likelihood of being called as a grand jury witness actually worked to defendant Osticco's benefit. In reality, whether Cortese was still a witness was somewhat irrelevant as to whether Osticco could be convicted under the omnibus clause of 18 U.S.C. §1503. It appears that one of the problems in the case was that the word "witness" was eliminated from the first section of the statute on October 12, 1982, just one week before the indictment was returned against defendant Osticco. However, Cortese's potentiality as a witness remained an issue under the omnibus clause because one of the ways in which he could obstruct justice would be to go before the grand jury investigating the alleged jury tampering in the 1977 flood fraud trial and testify untruthfully about his knowledge thereof. A case particularly on point with regard to the present issue is *United States v. Friedland*, 660 F.2d 919 (3d Cir.1981), in which appellant raised an argument that an individual was not a "witness" for purposes of 18 U.S.C. §1503. The *Friedland* court reasoned as follows:

> Rejecting a claim identical to that advanced by appellants, the court in *Falk v. United States*, 370 F.2d 472 (9th Cir. 1966), *cert. denied*, 387 U.S. 926, 87 S.Ct. 2044, 18 L.Ed.2d 982 (1967), stated:
>
> [T]he defendant . . . was not charged with influencing a 'witness' within the first provision of Section 1503. [He] was charged with endeavoring to influence, obstruct or impede the due administration of justice. The means of so doing was by attempting to corruptly influence prospective witnesses. It is clear that in the mind

> of the defendant, they were prospective witnesses. If he had thought otherwise, there would have been no reason to ask [them] to testify falsely. So, while the term 'witness' may be a word of art in an indictment under the first portion of Section 1503, the phrase 'prospective witnesses' is descriptive only of the intended status of [those whom the defendant attempted to influence] when the Indictment charges obstruction of justice.

Id. at 930-31. Even though the word "witness" has now been eliminated from the first part of the statute, obviously the perceived potentiality of an individual as a witness is relevant to charges under the omnibus clause. The testimony indicated that defendant Osticco believed Charles Cortese was a potential grand jury witness and/or that Cortese might voluntarily appear before the grand jury and divulge incriminating information about Osticco. Accordingly, the court's focus on the words "potential witness" or "likely witness," if erroneous at all, was, nevertheless harmless.

IV. Immunity and Witness Unavailability

Another issue raised by defendant deals with whether Cortese should have been granted immunity when he was called by the government at trial. At the time Cortese was called he invoked his fifth amendment privilege to remain silent and the court determined he was unavailable as a witness. As the government has pointed out, no conclusory decision from the Third Circuit has been forthcoming on whether the government must immunize a co-defendant who has invoked his fifth amendment privilege on the witness stand. We have, however, examined with interest the case of *United States v. Lang,* 589 F.2d 92 (2d Cir.1978) wherein the United States Court of Appeals for the Second Circuit

stated, citing numerous cases, "[T]he law appears to be well settled that the power of the Executive Branch to grant immunity to a witness is discretionary and no obligation exists on the part of the United States Attorney to seek such immunity." *Id.* at 95-96. In *Lang* the court refused to espouse the granting of immunity to an individual who purportedly sold defendant counterfeit money, the possession of which was the basis of criminal charges against defendant. Although the court ultimately decided that the admission of a tape constituted reversible error [certain statements on it were not within the personal knowledge of the declarant], the court nevertheless held that the individual who had invoked his fifth amendment privilege prior to admission of the tape was an unavailable witness under Federal Rule of Evidence 804(a)(1) and that statements against penal interest pursuant to Federal Rule of Evidence 804(b)(3) appeared on the tape.

We have carefully studied defendant's position that the government must, in certain circumstances, provide immunity. Defendant, however, appears to recognize that the instant case does not fall within such circumstances. No serious argument can be made that the government's decision not to seek immunity for Cortese resulted from a deliberate intention to frustrate the fact finding process or to prevent testimony that was essential to Osticco's defense. Accordingly, defendant's immunity argument must be rejected.

V. Admissibility of Cortese Tapes

Both the government and defendant agree that the taped statements of Charles Cortese to Frank Parlopiano on July 25 and September 23, 1982, are admissible only if these statements fall under Federal Rule of Evidence 801(d)(2)(E) as made "in furtherance of the conspiracy" between Cortese and Osticco.

Appendix A

Defendant's position is that because large parts of these tapes dealt with Cortese's recollection of past events and were evoked by Parlopiano in an attempt to gather evidence, the statements made were not in furtherance of the conspiracy. Defendant, however, has overlooked the fact that where there is a present concern with continuing a portrayal or impression about past misdeeds, authority exists that narrations of said past events may be in furtherance of a present conspiracy. The United States Court of Appeals for the District of Columbia Circuit considered the issue in *United States v. Haldeman,* 559 F.2d 31 (D.C.Cir.1976), the prosecution arising from the Watergate affair. The following language of the *Haldeman* court is persuasive:

> As the threads of the cover-up began to unravel, it became increasingly important to review what had taken place in order to identify and shore up the loose ends. It became critical for the conspirators to try to ensure that any story they wished to present would not ring false and that any action they were considering would not backfire, a strategy whose success required total familiarity with the facts [footnote omitted].
>
> In a conspiracy in which consideration of alternative strategies played so central a role, [footnote omitted] statements which narrate past events are not necesssarily "mere narratives" in the usual sense of that phrase. Rather, they can constitute activity that is plainly and importantly "in furtherance of" a conspiracy, and thereby be admissible under the co-conspirator exception to the hearsay rule. *See, e.g., United States v. Annunziato,* 293 F.2d 373, 380 (2d Cir.), *cert.*

denied, 368 U.S. 919, 82 S.Ct. 240, 7 L.Ed.2d 134 (1961); *Zamloch v. United States,* 193 F.2d 889, 890-91 (9th Cir.), *cert. denied,* 343 U.S. 934, 72 S.Ct. 770, 96 L.Ed. 1342 (1952).

Id. at 110-11. In the present case, although not of the massive proportions addressed in *Haldeman,* the heart of the conspiracy was aimed at covering up an incident of jury tampering by preventing a grand jury from receiving truthful information about the incident. The statements of Cortese in the tapes in question, therefore, were in furtherance of the conspiracy and were admissible under the co-conspirator exception to the hearsay rule. As the court noted in *United States v. Hamilton,* 689 F.2d 1262, 1270 (6th Cir.1982), statements need not actually further a conspiracy in order to satisfy the "in furtherance of the conspiracy" language of the Rule but rather "[i]t is enough that they be intended to promote conspiratorial objectives." Cortese's rehearsal of what had happened clearly was to enable him to fabricate a plausible story for the grand jury if he were to be called to testify.

Defendant has also raised a question with regard to the active role Frank Parlopiano played in eliciting these statements from Cortese. A recent case considering and rejecting such an argument is *United States v. Mitlo,* 714 F.2d 294 (3d Cir.1983). The district court had concluded that a statement should be suppressed if a declarant had been induced by government trickery or deception to provide incrimination information. The United States Court of Appeals for the Third Circuit reversed and based its decision on the holding in *United States v. White,* 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971), that consensual monitoring and

recording by an informant are not constitutionally repugnant. Moreover, the *Mitlo* court cited *Lewis v. United States*, 385 U.S. 206, 209, 87 S.Ct. 424, 426, 17 L.Ed.2d 312 (1966), for the proposition that "in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents." In accordance with the foregoing discussion, we have concluded that the Cortese-Parlopiano tapes of July 25 and September 23, 1982, were properly admitted into evidence.

VI. Suppression of Electronic Surveillance

The suppression issue was fully considered and discussed in our memorandum of July 13, 1983, 568 F.Supp. 119 at 121-128. The conclusions reached in that memorandum and order are attached hereto and are incorporated herein by reference. (See Exhibit A hereto).

VII. Consecutive Sentences

At the sentencing hearing on December 16, 1983, the issue of the propriety of consecutive sentences was raised and argued. Both the government and defendant brought several cases to our attention and the government has filed a memorandum in support of consecutive rather than concurrent sentences in the instant case.

The problem before us is whether consecutive sentences are legally permissible when there is a conviction for obstruction of justice, 18 U.S.C. §1503, and conspiracy to obstruct justice, 18 U.S.C. §371. The government's position relies largely on *United States v. Dowling*, 633 F.2d 660 (3d Cir.), *cert. denied*, 449 U.S. 960, 101 S.Ct. 374, 66 L.Ed.2d 228 (1980). In the *Dowling* case the defendants were convicted of conspiracy under the same statute involved in the present matter and of two substantive offenses (armed robbery of a bank and jeopardizing bank patrons and

employees by using a handgun). Defendants were sentenced to concurrent twenty year terms on the substantive charges and a consecutive five year term on the conspiracy charge. In rejecting a challenge to the consecutive conspiracy sentence, the court stated, "it is well established that conspiracy to commit a substantive offense and the commission of the substantive offense itself are separate crimes and punishable as such." *Id.* at 668.

Defendant has relied on *United States v. Sampol,* 636 F.2d 621 (D.C.Cir.1980) and *Whalen v. United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Initially we note that neither of these cases involved a conspiracy charge coupled with a substantive offense. *Sampol* involved making false statements and misprision of a felony, and *Whalen* involved rape and murder of the victim during the perpetration of the rape. The double jeopardy problem perceived in those cases revolved around the test formulated in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1943) that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

Although in both *Sampol* and *Whalen* double jeopardy problems were found, the holding of the United States Court of Appeals for the Third Circuit in *Dowling, supra,* and the *Blockburger* test as applied to the facts of the present case, compel a different conclusion. As the government points out, conspiracy to obstruct justice and obstruction of justice are separate offenses in that each requires proof of a fact exclusive of the other. The touchstone of a conspiracy is an agreement and the substantive offense would not require that any agreement be shown. The substantive offense would require showing that the planned

endeavor actually went into effect. Under the circumstances, we find that consecutive sentences were legally permissible for the crimes for which defendant Osticco was convicted.

VIII. Conclusion

For all of the foregoing reasons, we have found that defendant's post-trial motions are unpersuasive and must be denied. An accompanying order in accordance with these findings will be entered.

APPENDIX B — JUDGMENT ORDER DATED JUNE 12, 1984, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING JUDGMENT OF CONVICTION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3635

UNITED STATES OF AMERICA

v.

JAMES DAVID "DAVE" OSTICCO,

James David Osticco, Appellant

(Criminal No. 82-00149-01 — M.D. Pa. — Scranton)

District Judge: Honorable William W. Caldwell)

Argued June 11, 1984

BEFORE: SEITZ, *Chief Judge,* HAYNSWORTH* and ADAMS, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the evidence is insufficient to support either a conviction for conspiracy or for obstruction of justice because

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* Honorable Clement F. Haynsworth, Jr., United States Court of Appeals for the Fourth Circuit, sitting by designation.

the alleged conspirators did not communicate either directly or indirectly through the government agent, (2) the district court erred in instructing the jury that the defendant could have violated §1503 if they found that Cortese was a likely witness or a potential witness (3) the government's refusal to confer testimonial immunity upon Cortese resulted in the failure of the government to make a good faith effort to render Cortese available and therefore the district court erred in admitting in evidence conversations between Parr and Cortese, and (4) the district court erred in admitting evidence of conversations between Parr and Cortese because they were not in furtherance of the conspiracy, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/ Seitz
Chief Judge

ATTEST:

s/ Sally Mrvos
Clerk

DATED: June 12, 1984

APPENDIX C — ORDER DATED JULY 9, 1984, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3635

UNITED STATES OF AMERICA

v.

JAMES DAVID "DAVE" OSTICCO,

James David Osticco, Appellant

(Criminal No. 82-00149-01 — M.D. Pa. — Scranton)

PRESENT: ALDISERT, *Chief Judge*, SEITZ, HAYNSWORTH,* ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, *Circuit Judges.*

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a

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* Honorable Clement F. Haynsworth, Jr., United States Court of Appeals for the Fourth Circuit, sitting by designation.

majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Seitz
Circuit Judge

DATED: July 9, 1984

APPENDIX D — ORDER DATED JULY 9, 1984 UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT STAYING MANDATE TO SEPTEMBER 7, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3635

UNITED STATES OF AMERICA

vs.

OSTICCO, JAMES DAVID "DAVE"

James David Osticco, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 7, 1984.

s/ Seitz
Circuit Judge

Dated: July 19, 1984

Office - Supreme Court, U.S.
FILED
DEC 6 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-380

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES DAVID OSTICCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court erred in admitting into evidence taped conversations of a co-conspirator without requiring a grant of testimonial immunity after the co-conspirator had invoked the privilege against self-incrimination.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-380

JAMES DAVID OSTICCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 13a-14a) is reported at 738 F.2d 424 (Table). The memorandum opinion of the district court (Pet. App. 1a-12a) is reported at 580 F. Supp. 484.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1984. A petition for rehearing was denied on July 9, 1984 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on September 7, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of conspiracy to obstruct justice, in violation of 18 U.S.C. 371, and obstruction of justice, in violation of 18 U.S.C. 1503. Petitioner was sentenced to five years' imprisonment on the conspiracy count and three years' imprisonment on the substantive counts, the sentences to be served consecutively. He was also fined a total of $13,000.

1. Petitioner's conviction resulted from his attempts to cover up activities relating to the so-called "flood fraud" trial, held in Scranton, Pennsylvania in late 1977. Four men had been indicted on fraud charges in connection with the federally funded cleanup effort in the Scranton/Wilkes-Barre region following the 1972 flood caused by hurricane Agnes. The indictment charged the men with receiving $500,000 for relief work not actually done and for equipment not actually supplied to local governments involved in the cleanup effort (Tr. 587). The trial lasted approximately seven weeks. After three days of deliberation the jury reported that it was unable to reach a verdict, and a mistrial was ultimately declared. The only juror to vote against conviction was Roseanne Donahue, who was then married to Charles Cortese (Tr. 598).

The evidence at trial (see Pet. App. 2a-4a) showed that in 1979 Cortese told Frank Parlopiano that he was the former husband of the holdout juror in the "flood fraud" trial and that Parlopiano should ask petitioner about Cortese. Cortese stated that at some point during the flood fraud trial petitioner had contacted him. Petitioner had told Cortese that some friends of his were involved in the trial and that he

wanted Cortese to get his wife (Donahue) to vote against conviction. Cortese agreed, and, after some initial hesitation, Donahue agreed to do as petitioner and her husband asked. As part of their agreement, petitioner gave Cortese $1,000, a set of automobile tires, and a pocket watch (Tr. 600-601).

In late December 1979, Cortese told Parlopiano that he had been served with a subpoena to appear before a grand jury that was investigating alleged jury tampering in the flood fraud trial (Tr. 781). In the second of two meetings between Parlopiano and petitioner to discuss Cortese's subpoena, petitioner instructed Parlopiano to tell Cortese to "keep his mouth shut," to "take the Fifth if he had to," and that petitioner would "take care" of Cortese's legal fees (Tr. 784). Parlopiano, pursuant to petitioner's directive, passed these instructions on to Cortese. Cortese appeared before the grand jury on January 3, 1980; as petitioner had directed, Cortese invoked his Fifth Amendment privilege (Tr. 785).

In February 1980, Cortese received a second subpoena to testify before the grand jury; in addition, he was granted immunity. Cortese reported this to Parlopiano who, in turn, told petitioner. Petitioner instructed Parlopiano to tell Cortese that "he has to lie now" (Tr. 802). Petitioner asked Parlopiano to attempt to find out what questions were asked of Cortese before the grand jury. Parlopiano then met with Cortese and told him, "these are the instructions that [petitioner] gave me to pass on to you" (Tr. 803). Parlopiano told Cortese "to lie if he had to," that "his attorney's fees would be taken care of," and that as soon as he had finished testifying to write down as many of the grand jury questions as he could remember (Tr. 803). Cortese testified on March 7,

1980, and subsequently met with Parlopiano. Cortese told Parlopiano that he had lied to the grand jury; he gave Parlopiano two or three sheets of paper on which Cortese had written some of the questions he was asked. Parlopiano eventually gave these sheets to petitioner, who kept them (Tr. 804). Cortese also told Roseanne Donahue, his former wife, that he had lied to the grand jury (Tr. 603).

In July 1981, petitioner instructed Parlopiano to tell Cortese that if he "stuck to his guns" there would be "a buck" in it for Cortese when the statute of limitations expired on the jury tampering investigation (Tr. 820). Petitioner also told Parlopiano that when it's all over "I'm gonna take care of" Cortese with "two shots in the head." Later in the same conversation, petitioner told Parlopiano, "there's nothing you have to tell [Cortese]. The only thing you got to tell him is keep his mouth shut. Right now." GXs 18, 20A.

Around this time Cortese told Parlopiano that he was having difficulties paying bills he had incurred. Parlopiano discussed the problem with petitioner, who agreed to give Cortese some money to cover the bills. Petitioner gave Cortese $400, through Parlopiano, in July 1981. Parlopiano advised Cortese that petitioner was the source of the funds. Pursuant to petitioner's instructions, Cortese executed a promissory note stating that the $400 was from Parlopiano and was to be repaid within one year (Tr. 843). Parlopiano showed the promissory note to petitioner on the following day. Petitioner instructed Parlopiano to retain the note "in case you need it one day" (Tr. 843).

During this period Parlopiano agreed to cooperate with an FBI investigation. From May 1980 until

September 1982 he taped numerous conversations he had with petitioner, Cortese, and others (Tr. 766).[1]

2. At petitioner's trial, the government called Cortese to testify. Cortese invoked his privilege against self-incrimination in response to questions by both government counsel and defense counsel. Petitioner then moved to require the government to immunize Cortese, but the trial court denied the motion. The government subsequently introduced taped conversations between Cortese and Parlopiano as statements against interest of an unavailable witness, pursuant to Fed. R. Evid. 804(b)(3), or, alternatively, as statements of a co-conspirator made during the course of and in furtherance of the conspiracy, pursuant to Fed. R. Evid. 801(d)(2)(E). The trial court admitted the taped conversations, and they were played for the jury.

In post-trial motions, petitioner renewed his contention that the government should have granted immunity to Cortese. The district court rejected that claim. It noted, inter alia, that "[n]o serious argument can be made that the government's decision not to seek immunity for Cortese resulted from a deliberate intention to frustrate the fact finding process or to prevent testimony that was essential to [petitioner's] defense" (Pet. App. 7a).

3. The court of appeals affirmed petitioner's convictions in a judgment order (Pet. App. 13a-14a). The court rejected petitioner's claims that the evidence was insufficient to support his convictions; that the jury instructions were erroneous; that conversa-

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[1] In July 1983, Cortese pleaded guilty to perjury before the grand jury. Donahue previously had pleaded guilty to a charge of obstruction of justice, based on her role in the flood fraud trial (Tr. 604).

tions between Parlopiano and Cortese should not have been admitted into evidence because the government had failed to confer immunity on Cortese; and that those conversations were not in furtherance of the conspiracy.

ARGUMENT

Petitioner contends (Pet. 6-13) that the trial court erred in admitting the conversations between Cortese and Parlopiano because Cortese's assertion of his privilege did not render him "unavailable" in the absence of a showing by the government that it had some significant interest in not granting him immunity. That contention lacks merit. The order of the court of appeals affirming the trial court's ruling does not warrant further review.

Petitioner does not suggest that the conversations were inadmissible under the Federal Rules of Evidence. The trial court admitted the conversations as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). See Pet. App. 7a. Under that rule, there is no requirement that the declarant be unavailable. The conversations also qualified as statements against interest of an unavailable witness, pursuant to Fed. R. Evid. 804(b)(3). Fed. R. Evid. 804(a)(1) expressly provides that a witness is unavailable if his testimony cannot be obtained because of a claim of privilege.[2] Before any of the tapes were played, Cortese was called to the witness stand and invoked his Fifth Amendment privilege in response to

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[2] The courts of appeals have agreed that a witness is unavailable if he refuses to testify on Fifth Amendment grounds. See, *e.g.*, *United States* v. *Rodriguez*, 706 F.2d 31, 40 (2d Cir. 1983); *United States* v. *MacCloskey*, 682 F.2d 468, 477 (4th Cir. 1982); *United States* v. *Toney*, 599 F.2d 787, 789-790 (6th Cir. 1979).

questions by both the prosecution and defense counsel. Thus, he was unavailable within the meaning of Rule 804(a)(1).

Petitioner concedes (Pet. 9) that the courts have rejected the contention that the government should be precluded from introducing hearsay declarations of a witness who asserts his Fifth Amendment privilege if it has failed to grant immunity to the witness. See, *e.g.*, *United States* v. *Wuagneux*, 683 F.2d 1343, 1358 n.11 (11th Cir. 1982), cert. denied, No. 82-1687 (Oct. 3, 1983); *United States* v. *Lang*, 589 F.2d 92, 95-97 (2d Cir. 1978); 4 D. Louisell & C. Mueller, *Federal Evidence* § 486, at 1030, 1070-1072 (1980). That view is consistent with the general principle that the decision whether to grant immunity is a prerogative solely of the prosecutor. See *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 11; *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 260-261 (1983); *United States* v. *Gottesman*, 724 F.2d 1517, 1524 & n.7 (11th Cir. 1984); *Snelling* v. *United States*, 719 F.2d 1067, 1068 n.3 (10th Cir. 1983); *United States* v. *Lenz*, 616 F.2d 960, 962-963 (6th Cir.), cert. denied, 447 U.S. 929 (1980).[3]

Petitioner nevertheless contends that *Ohio* v. *Roberts*, 448 U.S. 56 (1980), compels a different rule, since it suggests that the prosecution must make a

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[3] Indeed, the Third Circuit is the only court of appeals to have held that a court might ever have inherent authority to grant immunity, *Gov't of the Virgin Islands* v. *Smith*, 615 F.2d 964 (1980), but even that decision is limited to cases involving exceptional circumstances and has not, to the best of our knowledge, been applied to justify a grant of judicial immunity in any subsequent case. It is clear from the Third Circuit's disposition of the instant case that it found no exceptional circumstances here that could warrant such extraordinary action.

good faith effort to obtain a witness's presence at trial before the witness will be considered unavailable for purposes of the Sixth Amendment Confrontation Clause. But the Court was referring there to efforts to obtain the physical presence of a witness, not to a grant of immunity. See 448 U.S. at 74.[4] The Court in *Roberts* also held that hearsay evidence must be reliable in order to satisfy the Confrontation Clause. However, the Court went on to state that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception" (448 U.S. at 66). Petitioner does not deny that the conversations at issue here were within the hearsay exceptions of Rules 801(d)(2)(E) and 804(b)(3).[5]

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[4] The Third Circuit has recently held that the Confrontation Clause requires a showing of unavailability of the extra-judicial declarant as a prerequisite to admission of co-conspirator declarations under Rule 801(d)(2)(E). *United States* v. *Inadi*, No. 83-1882 (Nov. 13, 1984), slip op. 11-13. We do not agree with this holding and are currently considering whether to seek en banc or certiorari review in that case. It is, however, wholly immaterial here, since there is no suggestion that the procedures followed in this case are not entirely adequate to demonstrate unavailability.

[5] A number of courts of appeals have held that statements that fall within the co-conspirator exception to the hearsay rule automatically satisfy Confrontation Clause standards. See, *e.g.*, *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982) and 457 U.S. 1136 (1982); *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, No. 82-1069 (Nov. 7, 1983); *United States* v. *Burroughs*, 650 F.2d 595, 597 n.3 (5th Cir.), cert. denied, 454 U.S. 1037 (1981); *United States* v. *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). Other

Indeed, he does not challenge the reliability of the statements at all. Thus, nothing in *Roberts* requires a result different from that reached by the courts below.

Moreover, there is no merit to petitioner's claim that the government's failure to immunize Cortese impaired the fairness of his trial. Assuming arguendo that Cortese would have testified under a grant of immunity, petitioner makes no showing that such testimony would have influenced the outcome of the trial in any way. The credibility of any testimony by Cortese that might have been favorable to petitioner presumably would have been destroyed by cross-examination based on his earlier admission in the taped conversations and on his plea of guilty to charges of perjury involving his denials to the grand jury concerning his involvement with petitioner in the jury-tampering scheme and subsequent cover-up. Cortese's hypothetical testimony thus would have offered little support for petitioner's defense, and, indeed, might well have harmed it.[6]

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courts have concluded that an independent showing of reliability of co-conspirator statements is constitutionally required. See *United States* v. *Ordonez*, 737 F.2d 793, 802-804 (9th Cir. 1984); *United States* v. *Ammar*, 714 F.2d 238, 254-257 (3d Cir. 1983), cert. denied, No. 83-319 (Oct. 31, 1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976). However, there is no basis for arguing here that Cortese's statements would fail to satisfy any such requirement.

[6] Petitioner suggests (Pet. 9-10) that the government should have been required to grant immunity to Cortese in connection with petitioner's trial because it previously had granted him

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

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ERIC H. HOLDER, JR.
Attorney

DECEMBER 1984

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immunity in connection with testimony before the grand jury. Of course, it was entirely appropriate for the government to grant immunity to Cortese at the time it was attempting to determine the guilt of more culpable individuals, like petitioner, who had initiated the jury tampering scheme. By the time of petitioner's trial, there was no legitimate investigative purpose that would have been served by granting further immunity to Cortese.

Contrary to petitioner's suggestion (Pet. 10), the government did not gain any particular tactical advantage in not immunizing Cortese. As we have suggested in the text, any testimony Cortese would have given either would have been favorable to the government or would have been subject to effective cross-examination.

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No. 84-380

In The

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October Term, 1984

JAMES DAVID OSTICCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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JAMES DAVID OSTICCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

In light of the Solicitor-General's representation that the United States is considering seeking certiorari review of a subsequently decided Third Circuit decision holding that the Confrontation Clause requires a showing of the extra-judicial declarant's unavailability as a prerequisite to F.R. Evid. 801(d)(2)(E) admissibility, petitioner urges that the present petition should be granted, or at least deferred pending the Solicitor's decision on the subsequently decided case, because the present case is more worthy of certiorari review.

Mr. Justice White, dissenting from the denial of certiorari, in *Sansom v. United States,* ____ U.S. ____, 82 L. Ed. 2d 861 (No. 83-6454; June 25, 1984) sets forth the parameters of the existing division in the Circuits respecting the admissibility standards for co-conspirator declarations:

> In Ohio v. Roberts, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240 (1980), the Court held that the introduction of hearsay statements against a criminal defendant will not violate the Confrontation Clause if two requirements are satisfied. First, the prosecution must ordinarily demonstrate the unavailability of the declarant; second, the statements must bear sufficient "indicia of reliability." Id., at 65-66, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240. The Court noted that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Id., at 66, 65 L Ed 2d 597, 100 S Ct 2531, 17 Ohio Ops 3d 240. The question presented in this case is whether statements that satisfy Fed. Rule Evid. 801(d)(2)(E), which provides for the admissibility of statements of coconspirators, necessarily satisfy the requirements of the Confrontation Clause.
>
> The circuits are divided on the question whether coconspirator statements fall within the "firmly rooted hearsay exception" language of Roberts or whether, instead, a case-by-case inquiry into reliability is required.

* * *

> Because of the substantial confusion surrounding this frequently recurring issue, I would grant certiorari to resolve the conflict.

This issue has received considerable attention in the Third Circuit. In the panel decision in *United States v. Gibbs,* 703 F. 2d 683 (3d Cir. 1983) (withdrawn) it was held that the government must demonstrate unavailability of an extra-judicial declarant when it seeks to admit co-conspirator declarations under Federal Rule of Evidence 801(d)(2)(E). The panel decision was vacated and the *en banc* decision avoided the issue by holding that the defendant had failed to preserve for appeal the confrontation issue. *United States v. Gibbs,* 739 F. 2d 838 (3d Cir. 1984) (*en banc*) (petition for certiorari pending).

Recently, a panel of the Third Circuit has again held, consistent with the withdrawn panel decision in *Gibbs,* that the government must prove unavailability. *United States v. Inadi,* ____ F. 2d ____, No. 83-1882 (3d Cir., November 13, 1984).

In the brief for the United States in opposition to the present petition, the Solicitor has said:

> The Third Circuit has recently held that the Confrontation Clause requires a showing of unavailability of the extra-judicial declarant as a prerequisite to admission of co-conspirator declarations under Rule 801(d)(2)(E). *United States v. Inadi,* . . . We do not agree with this holding and are currently considering whether to seek *en banc* or certiorari review in that case. It is, however, wholly immaterial here [referring to the present petition], since there is no suggestion that the procedures followed in this case are not entirely adequate to demonstrate unavailability. (Fn. 4, Brief In Opposition).

The present case was tried in the United States District Court for the Middle District of Pennsylvania after the *Gibbs* panel decision, but before the *en banc* decision. The trial judge, in accordance with the *Gibbs* panel decision, required the government to demonstrate "unavailability". This procedure would likewise be in accordance with the recently decided panel decision in *Inadi, supra.*

The extra-judicial declarant asserted Fifth Amendment privilege and the trial judge held that the extra-judicial declarant, *i.e.*, co-conspirator was therefore "unavailable".

The present petition raises the point, preserved in the court below, that where the government is the proponent of the out-of-court declarations of the co-conspirator declarant, the declarant is not truly "unavailable" to the government because of the government's unique power to remove Fifth Amendment privilege by grant of testimonial immunity. Petitioner has not suggested that the government need necessarily always grant the testimonial immunity, it being evident that there are many situations in which the public interest would be disserved by the grant of testimonial immunity. Petitioner's point is that where the government is the proponent of extra-judicial declarations it should be required to make an appropriate showing in support of its decision to withhold testimonial immunity before the out-of-court declarant may truly be deemed unavailable.

In its brief in opposition, the government argues that petitioner has made no showing that had the extra-judicial declarant testified at trial his testimony would have been favorable to petitioner and, in any event, had the in-court testimony been favorable the declarant could have been impeached by his earlier out-of-court declarations (Brief in Opposition at p. 9).

The government's position misses the thrust of petitioner's point. Petitioner has argued that he was deprived of his right of confrontation, not necessarily some purported right to favorable testimony. With respect to the out-of-declarant's statements, petitioner was left without his fundamental right to confront the evidence. Moreover, it is simply not known what the declarant would have said had he testified at trial.

Mr. Justice White has noted that there is "substantial confusion surrounding this frequently recurring issue" in the Circuits. The present case, in petitioner's view, offers an ideal record for consideration of the pertinent issues because the present case combines both the core issue of interplay between the Confrontation Clause and F.R. Evid. 801(d)(2)(E) and the issue, specifically presented for review, of the procedural method for determining "unavailability" of the out-of-court declarant if he asserts Fifth Amendment privilege. Petitioner suggests that if the Court is to consider the Confrontation Clause issue, the most appropriate setting for such consideration is in a case, as here, where there has been an assertion of privilege by the declarant against the backdrop of a fully developed record. Petitioner makes this suggestion because this is the most frequent manner in which the issue may be expected to come up — "co-conspirators" will, by the nature of their exposure to prosecution almost inevitably assert such privilege.

Respectfully submitted,

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